

**GIULIA FIORELLI\***, **PATRIZIO GONNELLA\*\***  
**ANNA MARATEA\*\*\***, **SILVIA PIERGIOVANNI\*\*\*\***

THE EFFECTIVENESS OF JUDICIAL PROTECTION  
OF PRISONERS' RIGHTS\*\*\*\*\*

*ABSTRACT. The paper results from a research project which aims at critically reconstructing the different levels at which the system of protection of prisoners' rights is articulated. In particular, after analysing the non-judisdictional instruments, the essay will focus mainly on the forms of jurisdictional complaints, in order to highlight the profiles that still risk undermining their effectiveness.*

**CONTENT.** 1. The long road to effective protection of prisoners' rights – 2. Non-judicial prisoners' rights protection's forms – 2.1. National Guarantor for the rights of persons detained or deprived of liberty – 2.2. Regional and Local Guarantor for the rights of persons detained or deprived of liberty – 2.3. The role of the Third Sector and Antigone's experience: National Observatory on Prison Conditions, Antigone's Ombudsman and legal information desk – 3. Forms of judicial protection of prisoners' rights: complaints under Articles 35-bis and 35-ter of the Prison Law – 3.1. Serious and actual prejudice to the exercise of rights – 3.2. Protectable subjective juridical situations – 3.3. The identification of rights subject to protection: the domestic and supra-national case law – 4. The judicial procedure for the protection of prisoners' rights – 4.1. The structure of the grievance procedure – 4.2. The enforcement of the measure and the judgment of compliance – 4.3. The ineffectiveness of compensatory remedies under Article 35-ter of the Prison Law – 5. Prisoners' right and their discontinuous effectiveness

---

\* Associate Professor in Criminal procedure, Roma Tre University; author of para 1.

\*\* Research Fellow in Philosophy of Law, Roma Tre University; author of para 5.

\*\*\* Research Fellow, Laboratorio dei Diritti Fondamentali – Collegio Carlo Alberto; author of paras 2, 3.2 and 3.3.

\*\*\*\* Research Fellow, Research Centre 'Diritto Penitenziario e Costituzione – European Penological Center'; author of paras 3, 3.1 and 4.

\*\*\*\*\* The paper is the result of the research work carried out by the authors A Maratea and S Piergiovanni within the project 'The effectiveness of the judicial protection of prisoners' rights', funded by the Research Center 'Diritto Penitenziario e Costituzione – European Penological Center' and directed by Professor G Fiorelli.

---

## 1. *The long road to effective protection of prisoners' rights*

The judicial protection of prisoners' rights,<sup>1</sup> which is the focus of the project 'The effectiveness of the judicial protection of prisoners' rights' funded by the Research Centre 'Diritto Penitenziario e Costituzione – European Penological Center', is undoubtedly one of the most sensitive issues in the prison system, to which for a long time – perhaps even too long – proper attention has not been paid, first and foremost, by the national legislator.

Indeed, the requirement to guarantee prisoners adequate protection of their subjective legal positions – the violation of which is a potential consequence of the restrictive regime – has only recently received specific statutory provision within the prison system. This occurred when Law Decree No. 146 of 23rd December 2013, transposed into Law No. 10 of 21 February 2014<sup>2</sup> – as part of a broader reformist design aimed at reducing the phenomenon of prison overcrowding – has filled a long-standing gap in the Italian law about the protection of prisoners' and internees' rights.

Before this legal reform, with only rare exceptions jurisdiction, prisoners could only rely on a 'generic' right of complaint pursuant to Article 35 of the Law No. 354 of 26th July 1975 (Prison Act and enforcement of liberty deprivation and restriction measures).

This provision, even today, does not lay down any rule on the methods and

---

<sup>1</sup> For an in-depth examination of protection of prisoners' rights, see, among others, F Fiorentin, 'La tutela dei diritti dei detenuti' in F Fiorentin and A Marchesilli (eds), *L'ordinamento penitenziario* (Giappichelli 2005) 70 ff; C Fiorio, 'I diritti fondamentali delle persone detenute' in F Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (Giappichelli 2019) 3 ff; V Grevi (ed), *Diritti dei detenuti e trattamento penitenziario* (Zanichelli 1981); A Menghini, *Carcere e Costituzione. Garanzie, principio rieducativo e tutela dei diritti dei detenuti* (Editoriale scientifica 2022) 148 ff; A Pennisi, *Diritti del detenuto e tutela giurisdizionale* (Giappichelli 2002); M Ruotolo, 'La tutela dei diritti dei detenuti' in M Ruotolo (ed), *Diritti dei detenuti e Costituzione* (Giappichelli 2002) 189; S Talini, *La privazione della libertà personale. Metamorfosi normative, apporti giurisprudenziali, applicazioni amministrative* (Editoriale scientifica 2018).

<sup>2</sup> The law is published in G.U., *Serie Generale*, 21 February 2014, No. 43, p. 14. An overview of the legislation is offered by F Caprioli and L Scomparin, *Sovraffollamento carcerario e diritti dei detenuti, le recenti riforme in materia di esecuzione della pena* (Giappichelli 2015); R Del Coco, L Marafioti and N Pisani (eds), *Emergenza carceri. Radici remote e recenti soluzioni normative* (Giappichelli 2014); A Della Bella, *Emergenza carceri e sistema penale* (Giappichelli 2014); M Ruotolo, *Il senso della pena. Ad un anno dalla sentenza Torreggiani della Corte EDU* (Editoriale scientifica 2014).

---

results of the complaint procedure: the decision, taken *de plano* at the end of a procedure lacking adversarial and procedural formalities, ends up being a mere suggestion to the Prison Administration. It lacks the binding force of judicial decisions, against which neither further complaints to the Supervisory Court nor, even less, appeals to the Court of Cassation are allowed.<sup>3</sup>

Inevitable, therefore, that such a jurisdictional *deficit* would draw the attention of the Constitutional Court.<sup>4</sup>

The Constitutional Court was asked to review the constitutionality of Articles 35 and 69 of the Prison Act, in so far as they do not provide for judicial protection against acts of the Prison Administration that are detrimental to the rights of detainees, on the basis of the assumption that the restriction of personal liberty – according to the current constitutional system based on the primacy of the human person and his rights – does not in any way entail a *capitis deminutio* in the face of the discretionary power of the authority responsible for its implementation.<sup>5</sup>

Although implying an inherent limitation of liberty, the state of detention does not deprive the prisoner of his or her inviolable rights, the recognition of which is accompanied by the correlative attribution of the power to assert them before a judge in a jurisdictional procedure, according to minimum procedural standards constitutionally due. These standards include ‘the possibility of cross-examination, the stability of the decision and the possibility of appeal by Cassation’.<sup>6</sup>

And the procedure, initiated by the generic ‘complaint’ pursuant to Article 35 of the Prison Law, appeared in breach of these minimum guarantees in cases of prisoners’ rights violations.

---

<sup>3</sup> In this sense, let me refer to G Fiorelli, ‘Procedimento per reclamo e “nuova” giurisdizionalità?’ in Del Coco, Marafioti and Pisani (n 2) 138 ff.

<sup>4</sup> Judgment of the Constitutional Court No. 26 of 8 February 1999 [1999] Giur cost 176, with critical notes by S Bartole, ‘I requisiti dei procedimenti giurisdizionali e il loro utilizzo nella giurisprudenza costituzionale’, *ibid* 190; E Fazzioli, ‘Diritti dei detenuti e tutela giurisdizionale’, *ibid* 199; M Ruotolo, ‘La tutela dei diritti del detenuto tra incostituzionalità per omissione e discrezionalità del legislatore’, *ibid* 203; C Santoriello, ‘Quale tutela giurisdizionale nei confronti dei provvedimenti dell’Amministrazione penitenziaria?’, *ibid* 222. See also F Della Casa, ‘Un importante passo verso la tutela giurisdizionale dei diritti del detenuto’ [1999] *Dir pen proc* 850.

<sup>5</sup> In this meaning, Judgment of the Constitutional Court No. 26 of 8 February 1999 (n 4) 182.

<sup>6</sup> In these terms, Judgment of the Constitutional Court No. 26 of 8 February 1999 (n 4) 182.

---

Hence, the declaration of unconstitutionality – pronounced in Judgment No. 26 of 1999 – of the contested provisions.

However, due to the absence of a general jurisdictional remedy and being impossible to choose from a wide range of procedural forms<sup>7</sup> – without trespassing on the sphere traditionally reserved for legislative discretion – the judges of the Constitutional Court limited themselves to sanctioning the principle of the full protection of the rights of persons *in vinculis*, without specifying the exact procedural type to be followed in the complaint.

To this end, the Constitutional Court called on the legislature ‘to exercise its regulatory function in implementation of the principles of the Constitution’.<sup>8</sup>

Well, despite specifying the exact, it took almost fifteen years – and, in particular, the intervention of the European Court of Human Rights – for the legislature to introduce an instrument of judicial protection of prisoners’ rights within the prison system.<sup>9</sup>

In the well-known *Torreggiani* case<sup>10</sup>, the European Court of Human Rights – hearing numerous appeals by Italian prisoners who complain about the violation of

---

<sup>7</sup> For an in-depth analysis of the several complaints provided for by the Prison Law, see L Marafioti, ‘Il procedimento per reclamo’ in P Corso (ed), *Manuale della Esecuzione penitenziaria* (Zanichelli 2019) 405 ff.

<sup>8</sup> Thus, Judgment of the Constitutional Court No. 26 of 8 february 1999 (n 4) 188.

<sup>9</sup> On this point, L Marafioti, ‘Deflazione carceraria e tutela giurisdizionale penitenziaria: nuovi propositi e illusioni normative’ in Del Coco, Marafioti and Pisani (n 2) 9, speaks about ‘regulatory lethargy’.

<sup>10</sup> European Court of Human Rights, 8 January 2013, *Torreggiani and others v Italy*, No. 43517/09, No. 46882/09, No. 55400/09, No. 57875/09, No. 61535/09, No. 35315/10, No. 37810/10, which required the Italian State to provide – within one year from the finality of the judgment – remedies to ensure the immediate cessation and reparation of the violations caused to the detainee for inhuman or degrading treatment, due to the situation of prison overcrowding. Commenting on the decision, see M Dova, ‘Torreggiani c. Italia: un barlume di speranza nella cronaca del collasso annunciato del sistema sanzionatorio’ [2013] Riv it dir proc pen 948; M Pelissero, ‘La crisi del sistema sanzionatorio e la dignità negata: il silenzio della politica, i compiti della dottrina’ [2013] Dir pen proc 261; F Romoli, ‘Il sovraffollamento carcerario come trattamento inumano o degradante’ [2013] Giur it 1188; M Ruotolo, ‘Quale tutela per il diritto a un’esecuzione della pena non disumana? Un’occasione mancata o forse soltanto rinviata’ [2013] Giur cost 4549; G Tamburino, ‘La sentenza Torreggiani e altri della Corte di Strasburgo’ [2013] Cass pen 11; F Viganò, ‘Sentenza pilota della Corte EDU sul sovraffollamento delle carceri italiane: il nostro Paese chiamato all’adozione di rimedi strutturali entro il termine di un anno’ (2013) Dir pen cont <<https://archiviopdc.dirittopenaleuomo.org/d/1990-sentenza-pilota-della-corte-edu-sul-sovrappollamento-delle-carceri-italiane-il-nostro-paese-chiamato-all-adozione-di-rimedi-strutturali-entro-il-termine-di-un-anno/>> accessed 22 July 2023.

---

their right not to suffer inhuman or degrading treatment or punishment as a result of prison overcrowding – observes that ‘the complaint addressed to the supervisory magistrate pursuant to Articles 35 and 69 of the Prison Law, is an accessible remedy, but not effective in practice, since it does not allow a rapid end to imprisonment under conditions contrary to Article 3 of the Convention’.<sup>11</sup>

According to the interpretation of the Strasbourg Court, the complaint pursuant to Article 35 of the Prison Law would indeed represent an inadequate ‘preventive remedy’ to prevent the continuation of the violation of the right to be protected from inhuman and degrading treatment.

Having thus admonished the Government for its inability to demonstrate ‘the existence of a remedy capable of allowing persons imprisoned in conditions detrimental to their dignity to obtain any form of reparation for the violation suffered’<sup>12</sup>, the European Court of Human Rights called on Italy to establish, within one year, an effective remedy or a combination of remedies capable of offering prompt reparation for the prejudice observed during the detention regime.

In response to this admonition, the legislature implemented the *Torreggiani* judgement’ by introducing preventive and compensatory remedies for violations of prisoners’ human rights.<sup>13</sup>

In particular, the legislator has articulated the protection along two levels: a first level of ‘non-judicial guarantee’, represented by the right of ‘general complaint’<sup>14</sup> provided for by Article 35 of the Prison Law, and a second level of ‘judicial guarantee’, represented by the ‘new judicial complaint’<sup>15</sup> regulated by Article 35-bis of the Prison Law, to underline the progressiveness of the protection mechanisms and their traceability to a unitary system.<sup>16</sup>

---

<sup>11</sup> Thus, ECHR, *Torreggiani and others v Italy* (n 10) 97.

<sup>12</sup> In these terms, *ibid.*

<sup>13</sup> For an overview of the preventive and compensatory remedies for violations of prisoners’ human rights, see Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1).

<sup>14</sup> See para 2.1.

<sup>15</sup> See paras 3 ff.

<sup>16</sup> The progressiveness of the instruments of protection is emphasised by the CSM, ‘Opinion rendered on the text of Decree-Law No. 146 of 23 December 2013’, concerning urgent measures on the protection of the fundamental

## 2. *Non-judicial prisoners' rights protection's forms*

### *2.1. National Guarantor for the rights of persons detained or deprived of liberty*

In relation to the first level of guarantee, one of the subjects identified by Article 35 of the Prison Law as a possible recipient of the 'generic complaint' is the National Guarantor for the rights of persons detained or deprived of liberty.

This guarantee institution was introduced into our legal system in 2014<sup>17</sup> in the form of a collegial body, composed of the President and two members who shall remain in office for five years, which cannot be extended.

Independent guarantee figures for the protection of human rights, with particular reference to the prison, were urged on several occasions at the international level.

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>18</sup> established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment. The members of the Committee shall be chosen from among persons known for their competence in the field of human rights or having professional experience in the areas covered by the Convention and they shall be independent and impartial. More specifically, the Article 9 of the European Prison Rules of 2006 states that all prisons shall be subject to regular government inspection and independent monitoring.

For the purposes herein, it is of importance the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).<sup>19</sup> The objective of the Protocol is to establish a system of regular

---

rights of prisoners and the controlled reduction of the prison population (Council Resolution of 23 January 2014).

<sup>17</sup> See Article 7, law-decree 23 December 2013, No. 146, converted with amendments by the law 21 February 2014, No. 10.

<sup>18</sup> Adopted on 26 June 1987 and come into force for Italy on the first of April 1989.

<sup>19</sup> Adopted on 18 December 2002 by the General Assembly of the United Nations by resolution A/RES/57/199 and come into force for Italy with the law 9 November 2012, No. 195.

---

visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.<sup>20</sup> The national preventive mechanisms shall be granted at a minimum the power to regularly examine the treatment of the persons deprived of their liberty in places of detention,<sup>21</sup> with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment and to make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations. As national preventive mechanisms,<sup>22</sup> Italian government identified the National Guarantor for the rights of persons detained or deprived of liberty.<sup>23</sup>

In this sense, as national preventive and independent mechanisms, the National Guarantor can carry out his task of monitoring the treatment of the persons deprived of their liberty through the power of free access to all places of detention and their installations and facilities, without any authorization from the competent authorities being required. According to Optional Protocol,<sup>24</sup> deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.<sup>25</sup>

---

<sup>20</sup> Article 17, OPCAT.

<sup>21</sup> Article 19, letter a), OPCAT.

<sup>22</sup> Although it is beyond the scope of this contribution, it is worth noting that the National Guarantor, as national preventive mechanism, has also been assigned the task of monitoring the Immigration removal (CPR), through the attribution of an unconditional power access; also, based on the UN Convention on the Rights of Persons with Disabilities, it has also been assigned the task of monitoring facilities for the elderly or persons with disabilities.

<sup>23</sup> On the elements of impairment of the independence requirement see C Florio, 'Art. 7 d.l. 23 dicembre 2013, n. 146 conv. l. 21 febbraio 2014 n. 10' in F Della Casa and G Giostra (eds), *Ordinamento penitenziario* (Wolters Kluwer 2019) 1373.

<sup>24</sup> Article 4, paragraph 2, OPCAT.

<sup>25</sup> Thus, its power of unconditional access is extended not only to prisons, but also to police stations, Residences for Security Measures (REMS) and wards where compulsory health treatment is carried out (psychiatric diagnostic and treatment service, SPDC).

---

During the visits made by the Guarantor, he is called to regularly monitor human rights violations into places where people are deprived of their liberty, on the one hand, soliciting the administrations directly concerned to take the necessary measures; on the other, making recommendations to the relevant governmental and parliamentary authorities in order to disclose the problems that plague the prison system outside prison walls. To this end, it is obliged to transmit an annual report on its activities to the Presidents of the Senate of the Republic and the Chamber of Deputies, as well as to the Minister of the Interior to the Minister of Justice.<sup>26</sup>

A further purpose of the visits is to identify any critical issues and find solutions, through an activity of intermediation and collaboration with the responsible authorities. In this sense, the National Guarantor operates as an instance of protection of collective and individual interests compromised by the inertia of the administration or by its illegitimate or inappropriate conduct, intervening on its activity, not by binding it to remedy violations of certain rights, but by having at its disposal the powers and functions through which to prevent the emergence of a conflict between the person *in vinculis* and the administration itself.<sup>27</sup>

The National Guarantor, like Local Guarantors, exercises its function as a preventive and non-binding resolution mechanism also in individual situations of hostility that may arise between detained persons and the administration. This function is exercised by conducting interviews and exchanging correspondence with prisoners. Indeed, the Article 18, paragraph 2, of the Prison Law, recognizes to all prisoners as a genuine right to have meeting and correspondence with Guarantors of human rights.

Furthermore, following the amendment of 2018,<sup>28</sup> the interviews do not have to be counted in the total number of those scheduled and do not require prior authorization by the Head of the single prison. This is to avoid forcing the prisoner to face the alternative between exercising the right to maintain family and emotional relations and the right to extra-judicial protection.<sup>29</sup> The meetings in question are carried

---

<sup>26</sup> See Florio (n 23) 1378.

<sup>27</sup> See MG Coppetta, *sub* art. 35 in Della Casa and Giostra (n 23) 458.

<sup>28</sup> Amended by Article 12-bis, paragraph 1, letter a), law-decree 207/2008, converted with law No. 14/2009.

<sup>29</sup> See Florio (n 23) 1377; K Natali, 'La giurisprudenza di merito' in Fiorentin (ed), *La tutela preventiva e compensativa*

---



out in the manner pursuant to the Article 18, paragraph 3, of the Prison Law and, therefore, in 'dedicated premises' and without auditory control by penitentiary agents. Pursuant to the Article 35, of the Prison Law, even prisoners under Article 41-*bis*, penitentiary law, have been granted the right to have access in full confidentiality to the meeting with this authority, which, as a result, will take place without the glass partition and without the obligation to listen to the contents of the same.<sup>30</sup>

It should be specified that any interview with the Guarantor may also be for the purpose of allowing the detainee to make general oral complaints covered by Article 35 of the Prison Law and discussed below.

On the occasion of the meeting – and beyond them – the National Guarantor may be the recipient of complaints pursuant to Article 35 of the Prison Law, reserving to the Judicial Authority the jurisdictional complaints requiring the intervention of the Supervisory judge.<sup>31</sup>

The introduction of the figure of the Prisoners' Guarantor aims, without any doubt, to strengthen the protection of prisoners. In this direction, the Guarantor, in his capacity as guardian of the rights of detainees and injured by the penitentiary Administration, carries out an action in competition with that of the Supervisory judge. To this end, Article 35 of the Prison Law, includes both of the aforementioned persons among the possible recipients of general complaints,<sup>32</sup> which may be oral or written and, the latter, may also be submitted in a sealed envelope. The law – as already mentioned<sup>33</sup> – does not provide for any rules regarding the procedure, the decision and the manner of intervention.

---

*per i diritti dei detenuti* (n 1) 374; A Della Bella, 'I reclami ex art. 35-bis ord. pen. avverso le prescrizioni del regime detentivo', *ibid*, 337-338.

<sup>30</sup> Which, precisely in order to guarantee the necessary confidentiality of interviews with this figure, admits the possibility of addressing the Garanti also in a sealed envelope. On this point, see Florio (n 23) 1377-1378; and Natali (n 29) 376.

<sup>31</sup> See Florio (n 23) 1378.

<sup>32</sup> Article 35 also includes the Head of the prison, the Regional Superintendent, the Head of the Department of Prison Administration, the Minister of Justice, the judicial and health authorities visiting the facility, the President of the Regional Council and the Head of State.

<sup>33</sup> See para 1.

However, through a systematic interpretation of the individual rules on criminal execution, the latter will follow the same procedure as that described in Article 75, paragraph 4, of the Executive Regulation, which provides for a general obligation to inform the complainant as soon as possible.<sup>34</sup> The administrative and non-judicial nature of the measure renders inadmissible both the complaint to the supervisory court pursuant to Article 14-ter of the Prison Law, and the appeal to the Court of Cassation pursuant to Article 111 of the Constitution. The lack of procedural guarantees, which has always characterized the general complaint, configures it as a remedy unsuitable to ensure adequate protection of the rights of detainees and, consequently, it remains a rule lacking in effectiveness, since no authoritative powers of the Guarantor are contemplated in the event that the Administration refuses to intervene. Nevertheless, the extreme 'pliability' of the generic complaint, which may well be directed towards any aspect of the organization of prison life, makes it possible to convey an infinite typology of requests not covered by judicial remedy.

Among other things, the prison represents one of the places where the actual reality is furthest removed from the legal model described by the rules, with the direct consequence that in that total institution, in that closed regime, control over the legality of the same and the legality of the actions within it, is complex.<sup>35</sup> Moreover, the practices of prison life often take the form of daily harassment that is hardly noticeable and which lacks the requirement of seriousness necessary for the enforceability of judicial protection, as discussed below. Consequently, the presence of a para-judicial intermediate protection mechanism appears necessary for two reasons. Firstly, it allows an external and highly specialized look inside the prison walls. Secondly, the constant presence in places of deprivation of liberty of 'other' figures of protection makes it possible to reach all those situations that inevitably escape the control of the Supervisory judge already burdened with multiple functions;<sup>36</sup> furthermore, in Italy, there are few Supervisory judges and they are forced to cope with a quantity of prisoners that, on the

---

<sup>34</sup> See Coppetta (n 27) 459.

<sup>35</sup> See A Margara, 'Carcere, i vantaggi dell'Ombudsman' [2003] *Narcomafie*.

<sup>36</sup> See A Ciavola, 'L'area di applicazione del nuovo rimedio giurisdizionale' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 148-149.

---

contrary, is borderline unsustainable.<sup>37</sup>

## ***2.2. Regional and Local Guarantor for the rights of persons detained or deprived of liberty***

In addition to the National Guarantor, the guarantors for persons deprived of their liberty include regional guarantors at territorial level. As early as 1997,<sup>38</sup> the Antigone association had already felt the need to establish a form of guarantee in places of detention characterized by independence and specialization, experimenting with it first at the local level and then flanking it with an institutionalized figure at the national level. But it was only in 2003 that the first territorial Guarantor of the City of Rome<sup>39</sup> was established, followed by those of numerous other municipal, provincial and regional authorities. This guarantee institution was borrowed from the figure of the *ombudsman* of Scandinavian culture,<sup>40</sup> ie a mechanism set up to protect and guarantee the good performance of the administration *vis-à-vis* the citizen with the function of receiving complaints and possibly suggesting non-binding solutions. Currently, these guarantee institutions, with specific competence in prison matters, appear to have been activated in all the Regions and Autonomous Provinces of Italy, except for the Autonomous Province of Bolzano.

Regardless of their different names, they are conceived as guarantors of the rights of persons *in vinculis*, in a sense that is not only defensive but also assertive of the positions of individuals *vis-à-vis* the power of the administrations. Like the National

---

<sup>37</sup> See D Aliprandi, 'Magistrati di sorveglianza, sono meno di 200 per oltre 55.000 detenuti' *Il Dubbio* (Rome, 10 February 2017).

<sup>38</sup> See "L'Ombudsman e la tutela dei diritti umani nei luoghi di detenzione" convegno internazionale promosso dall'Associazione Diritti umani – Sviluppo umano di Padova e dall'Associazione Antigone (per i diritti e le garanzie nel sistema penale) Università di Padova (14-15 novembre)' (*Radio radicale*, 14 November 1997) <<https://www.radioradicale.it/scheda/101058/lombudsman-e-la-tutela-dei-diritti-umani-nei-luoghi-di-detenzione-convegno>> accessed 22 July 2023.

<sup>39</sup> Next, it was the Region of Lazio that was the first to have a regional prisoners' Ombudsman, with Lazio Region Law No. 31 of 6 October 2003.

<sup>40</sup> See D Bertaccini and B Desi (eds), *I garanti (dalla parte) dei detenuti: le istituzioni di garanzia per i privati di libertà tra riflessione internazionale ed esperienza italiana* (Bologna University Press 2018) 51-82; Margara (n 35).

---

Guarantor, their essential function is to promote and guarantee the exercise of the fundamental rights of persons deprived of their liberty, such as, among others, the right to health, the right to education, the right to vocational training, the right to culture, the right to sport, the right to socialization and relations with their families and any other service aimed at recovery, social reintegration and integration into the world of work. In other words, the specific competences of the individual guarantors are distributed on the basis of the competences attributed to the regional or local authority to which they belong. By way of example, health protection, which is now the responsibility of the regional health service, will be the responsibility (though not the exclusive responsibility) of the Regional Guarantors; the Local Guarantors are competent on issues that may concern contacts with the territory or, Municipal Guarantors, on requests for identity documents. However, all matters relating to prison conditions and prison life remain within common competence.

The functions – not only of protection, but also of control on the work of the prison administration and on the detention conditions within the institutions – are similar to those envisaged for the National Guarantors. Specifically, the regional and sub-regional Guarantors are also allowed to conduct colloquia with prisoners (Article 18, paragraph 2, of the Prison Law); they can visit prison establishments without permission (Article 67 of the Criminal code); as well as, they can be the recipients of ‘generic’ complaints, pursuant to Article 35 of the Prison Law.

### ***2.3. The role of the Third Sector and Antigone’s experience: National Observatory on Prison Conditions, Antigone’s Ombudsman and legal information desk***

Still within the first non-jurisdictional level of guarantee of the protection of prisoners’ rights, an absolutely prominent position is held by the Antigone association.

Antigone is an association founded in 1992 that deals with justice, human rights, and prisons. It is called Antigone because, like the heroine of the Greek tragedy, they fight for justice to be without the cruel traits of revenge.

Its many activities, Antigone is involved in the collection and propagation of reality of prisons’ information, both as a constant reading of the relationship between regulation and implementation and as an information base for raising social awareness

of the prison problem.

These actions are carried out through the National Observatory on Prison Conditions<sup>41</sup> which received the permanent authorization from the Ministry of Justice to visit all the Italian detention centers. After each visit, the observers draft a report in which they describe the structural condition, the prison environment, the adherence to prison legislation and other salient features of the prison visited. All these information flow in the annual report on the prison conditions in Italy. It is a very important document that is normally used by whoever want to know the Italian detention system: media, students, experts and political parties.

Within Antigone, a significant position is taken by the Antigone's *ombudsman*,<sup>42</sup> which was established in 2008 and built on the Scandinavian ombudsman model.

The Ombudsman receives legal advice requests on many different issues: unjust transfers, denied access to health care, help to obtain an alternative measure to detention, prison overcrowding, denunciation of violence on prisoners. The support provided is mainly along two lines: on the one hand, information and promotion aimed at prisoners on their rights; on the other hand, assistance in the activation of these rights, through the preparation of petitions, complaints and reports to the competent authorities. Antigone's Ombudsman does not have any institutional role but uses the authority of the Association and its members to push for the just recognition of the rights of detained persons and the hours spend in solving the cases are completely volunteer. The Ombudsman cooperates with National Observatory on Prison Conditions, with the regional Antigone offices and with the legal information desk active within prisons. He dialogues with the National, Regional and Locals Guarantors for the rights of persons detained or deprived of liberty, as well as with third sector associations active on the territory and within prisons.

It has filed to the European Court of Human Rights over 1000 cases of violation of Article 3 of the European Convention of Human Rights that prohibits torture, inhuman and degrading treatments.

In collaboration with Antigone association, since the beginning of 2015 the

---

<sup>41</sup> See <<https://www.antigone.it/cosa-facciamo/osservatori>> accessed 22 July 2023.

<sup>42</sup> See <[http://www.osservatorioantigone.it/difensore\\_civico/](http://www.osservatorioantigone.it/difensore_civico/)> accessed 22 July 2023.

---

Department of Law has activated several legal information desks in prison which has a long-standing experience in the field of guarantees in the penal system and prisoners' rights. The first, in 2015, has been activated at the Regina Coeli Prison and in 2017, at the Rebibbia Women's Prison. Additionally, at the beginning of 2020, the Guarantor of persons deprived of their liberty of Region Lazio launched a project of integration with universities and qualified associations to strengthen the instruments aimed at protecting the rights of prisoners, to be realized through the establishment of new Legal Desks for the rights of prisoners in eleven of the fourteen prisons in the region. As part of this project, and thanks to Antigone's high specialization in the field, the Department of Law of the University of Roma Tre has been entrusted with the activation of the Desks at the Prison Institutes of Rome Regina Coeli, Rebibbia Femminile, Casa di Reclusione, and Terza Casa Circondariale. The new desks act in synergy with the staff of the Guarantor's Office, communicating the cases in which it is necessary to speak with the heads of public administrations or competent authorities to resolve the problem expressed by the detainee, and periodically reporting to the Guarantor all problems of a general nature related to the Institute that emerged during the activities.

The activities described above are necessary for the purposes of the discussion, as they fall within the concept – in the broadest sense understood – of para-jurisdictional protection of the rights of detained persons at a level other than the institutional level and which, transversally and jointly with the activities of the institutional figures of the guarantors, perform overlapping functions. In fact, the activity carried out by the National Observatory and the legal information desks allows, on the one hand, to give a non-institutional voice to the problems within the penal institutions, both with reference to the detention and structural conditions of the prisons, and with regard to the concrete needs of the prisoners – collectively and individually – that emerge in the course of daily prison life and that correspond, on different levels, to the effective exercise of their rights. Moreover, it is well known that the role of an external observer, by the mere fact of observing, can modify the reality he observes and, consequently, also the observed, thus orienting it towards a vision more in line with the requirements of legality imposed by the legislation.

On the other hand, the work of the Ombudsman and of the legal information

---

desks (albeit limited to the reality of the Roman prisons) ensure that prisoners can effectively exercise their rights through the support that these two figures offer in the concrete drafting of petitions, in the submission of appeals to the Court of Human Rights and through the activity of dialogue with the professionals within the institutions in order to redeem conflicts that arise between them and the prisoners, preventing any situations of power abuse.

When reference is made to power abuse, it does not only and exclusively concern its manifestation through the exercise of physical violence,<sup>43</sup> but refers, for the most part, to the authority's discretion to derogate and apply the legislation in force where this leaves gaps, lack of clarity or when it is itself the authority that grants it discretionary power. In fact, the problems that are put forward often do not concern major violations, but rather everyday life issues that are apparently of little importance but which, in practice, translate into violations of the rights of subjects *in vinculis*. And this because every phase of the prisoners' day takes place under the direction of an authority that governs their existence in every aspect.

Therefore, the activities carried out by the Antigone association can undoubtedly be traced back to all those preventive mechanisms and protection of human rights that respond to the demands of the international community and guarantee the effectiveness of protection.

### **3. *Forms of judicial protection of prisoners' rights: complaints under Articles 35-bis and 35-ter of the Prison Law***

Once the analysis of the figures and means that fall within the forms of non-judicial protection of the rights of detainees has been concluded, it is possible to focus on the access requirements and procedures that characterize the second level of guarantee of prisoners' legal positions, ie the jurisdictional one.

In particular, it will be necessary to investigate what is the relationship between the former institution of the generic complaint and the new forms of jurisdictional

---

<sup>43</sup> Which is, without a doubt, the ultimate expression of the abuse of the exercise.

---

complaint, as well as to verify whether the critical issues previously posed by the absence of a remedy lacking the characteristics of jurisdiction can really be considered overcome.

### ***3.1. Serious and actual prejudice to the exercise of rights***

Trying to strike a delicate balance between the effectiveness of the forms of protection of rights and the efficiency of access to the courts,<sup>44</sup> the legislator has made access to the judicial complaint subject to the fulfilment of specific conditions.<sup>45</sup>

In particular, pursuant to Article 69, paragraph 6, letter b), of the Prison Law, the prisoner is entitled to complain to the Supervisory Penitentiary Magistrate about the activity carried out by the Administration in breach of prison regulations, provided that actual and serious prejudice to the exercise of his rights has resulted.

Therefore, three requirements are essential:<sup>46</sup> an administrative action illegitimate because of the failure to comply with the law on the prison system or its regulation; a prejudice to the exercise of the prisoner's rights, causally linked to the act or conduct of the Administration; the seriousness and actuality of the injury suffered.

Regarding the first requirement, namely the wrongful act committed by the Administration, the legislative option of using the term 'non-compliance' initially made it difficult to identify the possible sources of the prisoner's prejudice.

According to the now prevailing interpretation,<sup>47</sup> the administration may answer

---

<sup>44</sup> On the complementarity and contextual contrast between the two profiles see I Pagni, 'Effettività della tutela giurisdizionale', *Enc dir* (Annali X, 2017) 357 ff. On the subject, see also M Luciani, 'Garanzie ed efficienza nella tutela giurisdizionale' (2014) 4 Rivista AIC.

<sup>45</sup> On the subject, GM Napoli, 'I diritti delle persone detenute tra pregiudizi collettivi ed effettiva garanzia' [2021] Riv it dir proc pen 1349, qualifies Article 35-bis of the Prison Law as a 'secondary guarantee instrument'.

<sup>46</sup> See L Marafioti, 'Il procedimento per reclamo' (n 7) 428; in an adhesive sense, see also M Bortolato, 'Torreggiani e rimedi preventivi: il nuovo reclamo giurisdizionale' [2014] Arch pen 576; as well as K Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (Giappichelli 2019) 57.

<sup>47</sup> In this sense see S Romice, 'L'effettività della tutela preventiva dei diritti dei detenuti e degli internati. A proposito del reclamo giurisdizionale ex art. 35-bis o.p.' (2016) Dir pen cont 6; A Della Bella, *Emergenza carceri e sistema penale* (n 2) 140; Ciavola (n 36) 134; A Menghini, 'La Cassazione sulla portata applicativa del c.d. reclamo giurisdizionalizzato' [2018] Giur it 731; E Valentini, 'Il reclamo: casi e forme' in Caprioli and Scomparin (n 2) 218; A Menghini, *Carcere e Costituzione* (n 1) 228. On the issue, see Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 58.

---



either for having engaged in merely material conduct, whether active or omissive, or for having adopted an unlawful administrative measure. With reference to the latter case, in particular, not only acts adopted in breach of the law, but also those vitiated by an excess of power,<sup>48</sup> ie expressing an unreasonable exercise of administrative discretion,<sup>49</sup> are relevant.

Focusing now on the nature of the relevant prejudice, it should be noted, first of all, that the legislator has identified as the object of injury not the right in the static sense, but its dynamic manifestation.

Indeed, the reference in the legislation to the prejudice caused to the exercise of rights attributes relevance to conduct that undermines the dialectical relationship between the prisoner and the Administration, which is established when the prisoner enters the Penitentiary Institution and from which arise precise duties of protection on the part of the public custodian.<sup>50</sup>

In order to make the offences deserving of judicial protection selectable *ex ante*,<sup>51</sup> the legislator has, then, identified two parameters that must be established in order for the prisoner to have an interest in bringing proceedings: the *actuality* and the *seriousness* of the prejudice caused by the Administration.

However, both requirements have caused considerable difficulties in practical application.

In particular, about *seriousness*, it has been critically observed<sup>52</sup> that the violation of a right should in itself be considered worthy of a judicial injunction, especially when it is suffered by an intrinsically vulnerable subject such as the one *in vinculis*. Moreover, it proves difficult to draw a clear-cut line between sufficiently serious injuries and those

---

<sup>48</sup> Romice (n 47) 7, expresses some doubts on this point.

<sup>49</sup> On the various forms of excess of power see, among others, V Lopilato, *Manuale di diritto amministrativo* (Giappichelli 2021) 800.

<sup>50</sup> In this sense, see Romice (n 47) 11.

<sup>51</sup> This intention has been made explicit by the legislator since the *Relazione di accompagnamento al d.d.l. di conversione del d.l. n. 146 del 2013*.

<sup>52</sup> Bortolato (n 46) 580; D Vicoli, *sub art. 69 o.p.* in F Fiorentin and F Siracusano (eds), *L'esecuzione penale* (Giuffrè 2019) 818.

---

without such connotations, with considerable consequences in terms of legal certainty.<sup>53</sup> Indeed, the task of filling the parameter in question with meaning is, *de facto*, left to the sensitivity of the individual Supervisory Penitentiary Magistrate, competent to decide in the specific case.<sup>54</sup> The doctrine has therefore proposed to mitigate through interpretation the selective effectiveness of the seriousness requirement,<sup>55</sup> from which only those injuries so slight as to constitute mere discomfort or annoyance would be excluded.

Even the *actuality* requirement presented significant critical aspects.

Particularly, as specified by the legislator itself,<sup>56</sup> the existence of this prerequisite must be assessed not only at the time the complaint is lodged, but also at the decision-making stage. Therefore, both injuries that are no longer in progress are excluded from the scope of Article 35-bis of the Prison Law, in respect of which the possibility of resorting to compensatory remedies remains firm,<sup>57</sup> and imminent injuries, from which the prisoner seems unable to defend himself in any way.<sup>58</sup>

---

<sup>53</sup> On this point, see S Talini, 'Il "diritto all'effettività dei diritti": quali forme di tutela per le persone private della libertà?' in M Ruotolo and S Talini (eds), *I diritti dei detenuti nel sistema costituzionale* (Editoriale scientifica 2017) 456.

<sup>54</sup> On this subject see L Degl'Innocenti and F Faldi, *Il rimedio risarcitorio ex art. 35-ter ord. pen. e la tutela dei diritti del detenuto* (Giuffrè 2017) 20, according to which 'seriousness must be assessed on a case-by-case basis with reference both to objective aspects (extent and duration of the injury) and to subjective aspects consisting of the prisoner's personal circumstances (age, sex, health conditions...)'.

<sup>55</sup> See F Della Casa, *sub art. 69 o.p.* in Della Casa and Giostra (n 23) 939.

<sup>56</sup> See *Relazione di accompagnamento al d.d.l. di conversione del d.l. n. 146 del 2013*, 14.

<sup>57</sup> In this sense, see Della Casa, *sub art. 69 o.p.* (n 55) 939; Bortolato (n 46) 582; Vicoli (n 52) 819, who recalls that such an indication may be inferred even from European Court of Human Rights case law and, in particular, from what was stated in the judgments, 10 January 2012, *Ananyev v Russia*, No. 20292/04, and *Torreggiani and others v Italy* (n 10).

<sup>58</sup> It is precisely the requirement of the actuality of the injury that has led doctrine to doubt the preventive nature of the complaint *ex Art. 35-bis* of the Prison Law. In particular, see Talini, 'Il "diritto all'effettività dei diritti"' (n 53) 455. Furthermore, the lack of a remedy of a preventive nature was the subject of Corte cost., 22 November 2013, No. 279 [2013] Giur cost, 6, 4514, with comments by F Della Casa, 'Il monito della Consulta circa il "rimedio estremo" della scarcerazione per il condannato vittima di un grave e diffuso sovraffollamento'; A Pugiotto, 'L'Urlo di Munch della magistratura di sorveglianza (statuto costituzionale della pena e sovraffollamento carcerario)'; M Ruotolo, 'Quale tutela per il diritto a un'esecuzione della pena non disumana?' (n 10).

---

### ***3.2. Protectable subjective juridical situations***

As already pointed, the Article 69, paragraph 6, letter b), of the Prison Law delimits the range of the preventive judicial protection by explicitly referring to the serious and current injury inflicted to the subjective legal situations. It has already been said through which actions (or omissions) the penitentiary administration may incur liability. It is now necessary to move on to the analysis of the interpretative issues concerning the determination of the necessary criteria to identify protectable subjective juridical situations. On this point, it is useful to start from the principle clearly expressed by the Constitutional Court in the well-known Judgment No. 26 of 1999, in which it is laid down that, according to the constitution, the restriction of personal freedom does not mean at all a *capitis deminutio*<sup>59</sup> in front of the discretionary power of the authority in charge for its execution; in other words, the person who suffers a prison punishment retains the ownership of fundamental rights and active subjective situations that are not degraded by the discretionary interventions of the penitentiary administration. However, the interests behind the legal positions of the detainees, while being while being qualitatively like those of free subjects, they have a difference in terms of content, suffering a boundary inherent in the needs arising from detention.<sup>60</sup> Indeed, the qualification of the protectable legal positions of prisoners and internees *vis-à-vis* the prison administration remains a debated terrain in case law today.

Among others,<sup>61</sup> one of the most debated issues concerns the possibility of bringing legitimate interests into the category of protectable claims under the procedure of the Article 35-bis of Penitentiary Law. Indeed, to solve this interpretative doubt, the Joint Sections intervened in 2003, reaffirming what had already been affirmed by the Constitutional Court in 1999. According to the Joint Sections,<sup>62</sup> the inmate is always the unalienable rights-holder and the exercise thereof is not referred to the simple

---

<sup>59</sup> See Corte cost., 11 February 1999.

<sup>60</sup> In this sense see Romice (n 47) 18.

<sup>61</sup> For a comprehensive treatment on the subject see GM Napoli, 'La natura giuridica delle pretese della persona detenuta azionabili davanti al magistrato di sorveglianza' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 151-182.

<sup>62</sup> See Cass. Sez. Un., 26 February 2003, No. 25079 and, in the same sense, Cass., 14 June 2017, No. 54117.

---

discretionary of the penitentiary administrative authority; otherwise, the penitentiary administrative discretionarily is always bound by its requirements and purposes; and even though it remains a regulatory power, it must always be exercised in accordance with the general principles of the legal system and without incurring the exercise of a non-proportional power compared to the aim pursued. Consequently, if the administrative action should be exercised outside these boundaries, it would result in an undue invasion of the recipient's legal sphere, causing that injury to the exercise of the detainee's rights that would allow the remedy under Article 35-bis to be activated.<sup>63</sup> In this sense, the traditional distinction between rights and legitimate interests is entirely marginal.<sup>64</sup> However, the Court of Cassation, on other occasions, has returned to this distinction, stating that when the power of the administration is normatively qualified as discretionary, there can be no talk of a subjective right, but the prisoner can only claim a legitimate interest and activate different remedies than judicial complaints.<sup>65</sup>

Moreover, it is common ground that the injury of mere fact expectations has nothing to do with the scope of this form of protection. Nor can the generic complaint under Article 35 of penitentiary law be made in respect of consequential damages that receive protection under the general rules that the legal system lays down for legal proceedings,<sup>66</sup> as well as all those subjective situations that may come into consideration at the time of application of the institutions proper to the criminal execution, concretely affecting the extent and quality of the punishment, for which the law lays down specific rules.<sup>67</sup> On the other hand, all those rights connected with the constitutionally assigned re-educative function of punishment, which find their basis in Article 27, paragraph 3, of the Constitution, are undoubtedly to be regarded as protectable subjective judicial

---

<sup>63</sup> See Napoli, 'La natura giuridica delle pretese della persona detenuta azionabili davanti al magistrato di sorveglianza' (n 61) 161.

<sup>64</sup> See Ciavola (n 36) 137.

<sup>65</sup> See, among others, Cass. pen., Sez. I, 12 December 2014, No. 3568; Cass. pen., 11 June 2014, No. 39966; Cass. pen., Sez. I, 20 March 2015, No. 20485; Cass. pen., No. 54117 of 2017.

<sup>66</sup> See Romice (n 47) 23; Cass. pen., Sez. I, 26 March 2015, No. 20488; Cass. pen., Sez. I, 15 January 2013, No. 4772.

<sup>67</sup> See Ciavola (n 36) 140; G Varraso, *sub art. 35-bis in A Giarda and G Spangher (eds), Codice di procedura penale commentato* (5th edn, 2017) 2366. See also Cass. Sez. Un., 26 February 2003, No. 25079.

---

situations; as well as the nucleus of the essential goods of life detectable by the combined provisions of Articles 2 and 13 of the Constitution and owned by every person.<sup>68</sup>

### ***3.3. The identification of rights subject to protection: the domestic and supranational case law***

Without any claim to exhaustiveness, it is now necessary to focus on the analysis of some of the rights identified by national and supranational case law that can be protected through the remedy under Article 35-bis of the Prison Law. Indeed, from the literal wording of Article 69, paragraph 6, letter b), of Prison Law it is not possible to identify which rights may give rise to a violation by the administration.<sup>69</sup> Consequently, it will be up to 'living law' to select the individual interests that can benefit from judicial protection. On the contrary, what is normatively established is the reference to the dynamic profile of the manifestation of the injury; in other words, the injury worthy of protection will concern, not the right in the abstract, but above all its 'exercise', ie all those injuries that concretely prevent the detainee from exercising it.

Individual interests can be traced back to homogeneous categories of rights affected by administrative activity.

First of all, reference is made to complaints concerning the right to health, of which only a few examples will be given.<sup>70</sup> In the case law dealt by the supervisory judiciary, one of its declinations concerned the dietary treatment of the prisoner as an essential component for the psycho-physical well-being of the person, with reference, firstly, to the prohibition for persons under Article 41-bis of the Prison Law to receive or purchase foodstuffs to be cooked. According to one orientation, the judges had held

---

<sup>68</sup> See Pennisi (n 1) 175; Valentini (n 47) 215.

<sup>69</sup> On the appropriateness of the division between claims subject to judicial remedy and non-judicial remedy, see D Galliani, 'Le briciole di pane, i giudici, il senso di umanità' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 73-76.

<sup>70</sup> For more in-depth case law on the right to health, see, si veda Natali, 'La giurisprudenza di merito' (n 29) 362-369, and Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 85-100. For a constitutional perspective on the right to health see M Caredda, 'Il diritto alla salute nelle carceri italiane. Questioni ancora aperte' in M Ruotolo and S Talini (eds), *Dopo la Riforma. I diritti dei detenuti nel sistema costituzionale*, vol 1 (Editoriale scientifica 2019).

that this limitation affected a mere interest and not a subjective right;<sup>71</sup> the Italian Constitutional Court intervened on this point, definitively establishing the existence of a fundamental right to cook food in one's own cell for persons under a differentiated regime, declaring unconstitutional Article 41-bis, paragraph 2-quater, letter f), limited to the words 'cooking food'.<sup>72</sup>

Moreover, sporting activity, having a positive impact on the psychophysical health of prisoners, has also been analyzed by the courts of merit in relation to compliance with your right to health. Indeed, it is the access to creative rooms, promenade rooms and the sports field equipped with instruments suitable for athletic and recreational use that has been held by the judiciary as a right of the subject in a differentiated regime.

In the international perspective, not finding express recognition within the European Convention for the Protection of Human Rights and Fundamental Freedoms (henceforth 'ECHR'), the European Court of Human Rights (henceforth 'the Court'), through an extensive and evolutionary construction, according to established case law, has brought the protection of the right to health of persons deprived of their liberty within the scope of the prohibition of torture and inhuman and degrading treatment or punishment (Article 3 ECHR).

In order to safeguard the health and well-being of persons *in vinculis*, the Court's pronouncements about inadequate cell space are all too well known to be examined in detail: it suffices, here, to recall that according to the Court's well-known guideline, this can constitute inhuman and degrading treatment.<sup>73</sup> Moving on, some of the Court's judgments found violations of Article 3 ECHR for the failure to provide adequate and timely medical care in the face of the worsening health condition of a prisoner suffering from leukemia.<sup>74</sup> Similarly, the Court also found a violation of Article 3 ECHR in cases of procrastination in the provision of medical care appropriate to the actual needs of a

---

<sup>71</sup> See Mag Sorv Macerata, 6 April 2017. In the same sense see Mag Sorv Reggio Emilia, 15 March 2011.

<sup>72</sup> See Corte cost, 12 October 2018, No. 186.

<sup>73</sup> Among others, 16 July 2009, *Sulejmanovic v Italy*, No. 22635/03; *Torreggiani and others v Italy* (n 10); 20 October 2016, *Muršić v Croatia*, 7334/13.

<sup>74</sup> ECHR, 14 November 2002, *Mouisel v France*, No. 67263/01.

---

detainee seriously ill with multiple sclerosis;<sup>75</sup> failure to provide care for a woman suffering from hepatitis and viremia;<sup>76</sup> of making a diagnosis that was not followed by appropriate treatment or adequate medical supervision;<sup>77</sup> but also in the case of refusal to provide a prisoner with the dentures he needed and could not afford to buy,<sup>78</sup> or eyeglasses damaged during arrest.<sup>79</sup> In a ruling in 2010,<sup>80</sup> the Court clarified what the State's obligations are in the treatment of sick prisoners: the States must ensure that a person is detained in conditions which are compatible with respect for his human dignity, and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.<sup>81</sup>

The Court also ruled on the forced feeding of prisoners on hunger strike, which was declared lawful if it was indispensable to save their lives, even in the absence of their consent and provided that it was medically necessary, adequate procedural safeguards were observed and that the manner in which it was carried out did not exceed the minimum threshold of severity; otherwise it may constitute a violation of the prohibition of torture.<sup>82</sup>

The Court has also ruled on the non-admission of prisoners to sanitary residences for the enforcement of custodial security measures, in line with national case law, both substantive and lawful.<sup>83</sup> Specifically, case law on the topic, at various levels,

---

<sup>75</sup> ECHR, 2 November 2006, *Serifis v Greece*, No. 27695/03.

<sup>76</sup> ECHR, 12 July 2007, *Testa v Croatia*, No. 20877/04.

<sup>77</sup> ECHR, 24 February 2009, *Poghosyan v Georgia*, No. 9870/07.

<sup>78</sup> ECHR, 16 February 2010, *VD v Romania*, No. 7078/02.

<sup>79</sup> ECHR, 20 April 2010, *Slyusarev v Russia*, No. 60333/00.

<sup>80</sup> *Ibid.*

<sup>81</sup> For more in-depth, see F Cecchini, 'La tutela del diritto alla salute in carcere nella giurisprudenza della Corte europea dei diritti dell'uomo' in A Massaro (ed), *La tutela della salute nei luoghi di detenzione. Un'indagine di diritto penale intorno a carcere, REMS e CIE* (Roma TrE-Press 2017) 23 ff.

<sup>82</sup> ECHR, 5 April 2005, *Nevmerzbitsky v Ukraine*, No. 54825/00 and ECHR, 19 June 2007, *Ciorap v Moldova*, No.12066/02. For the Court's orientation on the compatibility of the state of health with 'normal' conditions of detention, prison sanitary conditions and detention e mental health, see Cecchini (n 81) paras 4.2, 4.3 and 4.4.

<sup>83</sup> Corte cost, 27 January 2022, No. 22.

has stigmatised the phenomenon of the so-called ‘waiting lists’ as a result of which, in the absence of ‘available places’, unaccountable and dangerous persons are detained, while waiting, in prisons. The European Court of Human Rights, in the case of *Sy v Italy*,<sup>84</sup> held that the applicant’s placement in the ordinary prison regime prevented him from receiving therapeutic treatment appropriate to his medical condition, thus constituting a violation of Article 3 ECHR. Moreover, the Court, like the Italian Constitutional Court’s ruling,<sup>85</sup> found that there was a violation of the right to liberty and personal security under Article 5 ECHR as a consequence of the unlawfulness of part of the applicant’s detention in prison.

Returning to national case law, worthy of mention is the recognition for persons *in vinculis* of the right to access to medically assisted procreation (hereinafter MAP) techniques in the presence of the requirements of Law No. 40 of 2004.<sup>86</sup> The Court of Cassation<sup>87</sup> held that the failure to ensure the right of access to MAP techniques was unlawful since restrictions could not be justified by the need to respect the dignity and humanity of the person; it also extended the right to access to MAP to prisoners under the differentiated detention regime suffering from viral diseases with a high risk of transmission to the partner and foetus.<sup>88</sup>

The right to maintenance family and emotional relations of inmates under Article 41-bis regime – which is carried out, for the most part, through in-person meeting and phone call – is severely compressed because of the necessary balancing act with the – often pre-eminent – requirements of security. Consequently, the case law of the courts of merit is very copious. On the subject of meeting and phone call, by way of example only,<sup>89</sup> mention should be made, firstly, of the Court of Cassation’s ruling

---

<sup>84</sup> ECHR, 24 January 2022, *Sy v Italy*, No. 11791/20.

<sup>85</sup> See Corte cost, 27 January 2022: Court found a violation of Article 13, Const., holding that the placement of an inmate in a facility not qualified as a REMS constitutes a restriction of personal liberty *contra legem*, since it is implemented beyond the boundaries indicated by Article 13 of the Constitution.

<sup>86</sup> For more in-depth, see Talini, *La privazione della libertà personale* (n 1) 212-221.

<sup>87</sup> See Cass pen, sez. I, 20 February 2008, No. 7791.

<sup>88</sup> *Ibid.*

<sup>89</sup> For more in-depth case law on the right to affectivity, see Natali, ‘La giurisprudenza di merito’ (n 29) 369-372;

---



of 2014 in which it expressly affirmed the principle that a prisoner's right to have meeting and phone call with his family members, as an expression of a fundamental right, can never be completely impeded, not even when relevant social defence requirements are taken into consideration.<sup>90</sup> On the other hand, on the subject of the duration of in-person meeting, the Court of Cassation considered the extension of interviews from one to two hours to be legitimate, exceeding the requirements of the rule, and therefore, even if the interview took place in the previous week and the family members are resident in the same municipality as the institution.<sup>91</sup> In addition, the Court of Cassation held that the disapplication by supervisory magistrates only of a ministerial circular that, by imposing an interval of 30 quiet days, prevented the close fixing of the same.<sup>92</sup> On the other hand, with reference to the manner in which they are carried out, it has been recognised that they can be carried out without the dividing glass if the interlocutor is the child under 12 years of age and, according to a ruling by the supervising magistrate, must also be extended to the grandchild *ex filio*.<sup>93</sup>

In conclusion, without any doubt, human dignity, as the supreme principle of the legal system, constitutes an insurmountable limit for the execution of a measure restricting personal liberty. Therefore, it constitutes an insurmountable limit for the administration, beyond which a significant prejudice is generated as it affects the most intimate perimeter of the freedoms guaranteed to the prisoner.<sup>94</sup>

---

Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 101-116; A Della Bella, 'I reclami ex art. 35-bis ord. pen. avverso le prescrizioni del regime detentivo' (n 29) 331-338. For a constitutional perspective on the right to affectivity, see Talini, *La privazione della libertà personale* (n 1) 253-284, and S Talini, 'L'affettività ristretta' in Ruotolo and Talini (n 70) 70-94.

<sup>90</sup> See Cass, 12 December 2014, No. 7654.

<sup>91</sup> See Cass, 12 December 2014, No. 3115. In the same sense see Cass, 20 March 2015, No. 20486.

<sup>92</sup> See Cass, 25 November 2016, No. 10462.

<sup>93</sup> Scheme provided for in Circular No. 3592/6042 of 9 October 2003, in relation to which the courts of merit clarified that the favourable discipline must also be extended to the grandchild *ex filio*. See Mag Sorv Macerata, 6 April 2017.

<sup>94</sup> See Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 388.

---

#### 4. *The judicial procedure for the protection of prisoners' rights*

##### 4.1. *The structure of the grievance procedure*

Once the analysis of protectable subjective legal situations is complete, it is necessary to examine the procedure created by the legislator to check whether the prisoner's grievances are well-founded.

In particular, as provided by Art. 35-bis of the Prison Law, when the prisoner lodges a judicial complaint, it starts a proceeding to be conducted in the forms of the surveillance procedure, governed by Arts. 666 and 678 of the Code of Criminal Procedure.

Therefore, even in the judicial complaint procedure, there is an initial phase designed to examine the admissibility of the petition, followed by the holding of an adversarial hearing between the parties, which concludes with the adoption of an order, subject to appeal.

In spite of the legislator's intentions to provide guarantees, the decision to extend the model of the surveillance procedure to this proceeding immediately aroused considerable perplexity, given the different functions that characterise the two procedures.<sup>95</sup> Indeed, the jurisdictional complaint is justified by a grievance raised by the prisoner against the activity carried out by the public Administration and is connoted, therefore, by a contraposition of interests between the individual and the State, which is instead absent in the 're-educational jurisdiction'.<sup>96</sup> The judicial complaint procedure is, therefore, characterised by an antagonism between the parties, which makes it more similar to the logic of the judgement of cognition,<sup>97</sup> rather than to the surveillance procedure's one,<sup>98</sup> where the parties and the judge cooperate to

---

<sup>95</sup> On this point see, critically, K Natali, 'Il reclamo giurisdizionale per la tutela dei diritti dei detenuti' [2017] Riv it dir proc pen 1474, who says that it would have been better to create a procedure *ad hoc*.

<sup>96</sup> G Giostra, *Il procedimento di sorveglianza nel sistema processuale penale* (Giuffrè 1983) 142.

<sup>97</sup> On this topic, see K Natali, *sub* art. 35-bis o.p. in Fiorentin and Siracusano (n 52) 456, as well as Natali, 'Il reclamo giurisdizionale per la tutela dei diritti dei detenuti' (n 95) 1475 ff.

<sup>98</sup> About lack of conflict between the parties involved in the surveillance judgement, see A Gaito and G Ranaldi, *Esecuzione penale* (Giuffrè 2000) 83.

---

achieve the goal of social reintegration of the convicted person.<sup>99</sup>

It is precisely these different functions that made it necessary to introduce exceptions to the reference model, mostly developed in practice.

A first aspect, not expressly regulated, concerns people holding the power of initiative.

Article 678 of the Code of Criminal Procedure provides, in fact, that surveillance proceedings may be initiated at the request of the Public Prosecutor, the prisoner, his lawyer or *ex officio*.

In the absence of any legislative indication, it is controversial whether it is possible to attribute a power of action to the same people also in the context of proceedings under Article 35-bis of the Prison Law.

In particular, many doubts concern the possibility of recognising the Supervisory Penitentiary Magistrate's power to initiate proceedings *ex officio*: in fact, on the one hand, such an opportunity could be considered functional to the exercise of the role of guarantor of the legality of the sentence,<sup>100</sup> which he undoubtedly holds, but, on the other hand, this would seem difficult to reconcile with the noted antagonistic nature of the judicial complaint.

Majority doctrine tends, therefore, to exclude the active legitimacy of the Supervisory Penitentiary Magistrate,<sup>101</sup> considering that *ex officio* prosecution – insofar as it derogates from the rules of fair trial laid down in Article 111 of the Constitution – cannot be applied outside the surveillance proceedings, where it is justified by the peculiar purposes pursued in that context.

Even preliminary examination of the admissibility of the complaint raised some critical issues. Indeed, by express provision of the law, at this stage the Supervisory

---

<sup>99</sup> About the surveillance judgement, A Scalfati, 'Procedimento di sorveglianza "tipo" e art. 111 della Cost.' in A Scalfati (ed), *Giurisdizione di sorveglianza e tutela dei diritti* (Cedam 2004) 11.

<sup>100</sup> On this topic, F Fiorentin, 'L'iniziativa tra principio della domanda e poteri *ex officio*' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 193.

<sup>101</sup> In this sense see M Bortolato, *sub art. 35-bis o.p.* in Della Casa and Giostra (n 23) 467; Natali, *sub art. 35-bis o.p.* (n 97) 456; M Bortolato, 'La tutela dei diritti dei detenuti' in F Della Casa and G Giostra (eds), *Manuale di diritto penitenziario* (Giappichelli 2021) 104. *Contra*, see Valentini (n 47) 233 ff.

---

Penitentiary Magistrate is required to proceed pursuant to Article 666, paragraph 2, of the Code of Criminal Procedure, ie to ascertain that the complaint is not manifestly unfounded for lack of the legal conditions and that it does not constitute a mere repetition of a previous application.

It is precisely the verification of the merits of the petition that runs the risk of turning into a real assessment of the merits,<sup>102</sup> since it must at least concern the subjective legal situation alleged to have been harmed, as well as the seriousness and actuality of the injury resulting from it. This profile is even more critical due to the absence of hearing of the parties, since Article 666, paragraph 2, of the Code of Criminal Procedure only requires the prior hearing of the Public Prosecutor, whereas the prisoner may only contradict during the phase of the appeal against the decree of inadmissibility.<sup>103</sup>

Once this preliminary examination has been successfully passed, the Supervisory Penitentiary Magistrate sets the date of the hearing. No express provision was made for the period that may elapse between the filing of the complaint and the holding of the hearing. Since this is an urgent procedure, due to the actuality of the prejudice to the exercise of rights, it would have been preferable instead to specify in advance a maximum time limit for the setting of the hearing, so that the excessive length of time does not undermine the effectiveness of the protection.

Once the date of the hearing has been fixed, pursuant to Article 35-bis, paragraph 1, of the Prison Law, the notice of the setting of the hearing must be served on the prisoner lodging the complaint, as well as on the Administration concerned.<sup>104</sup>

---

<sup>102</sup> In the context of surveillance proceedings, it has been proposed to resolve this profile through a restrictive interpretation of the concept of 'legal conditions', understood as referring only to legal conditions. In particular, the jurisprudence of legitimacy now seems to be constant in considering that the reasons for inadmissibility must be 'self-evident' and must not imply the resolution of controversial issues. On this topic, see Cass, Sez. III, 3 November 1994, No. 2886, in CED Cass, rv 200724-01; Cass, Sez. III, 27 April 1995, No. 1477, *ibid*, rv 202474-01; Cass, Sez. I, 27 April 2004, No. 24164, *ibid*, rv 228996-01; Cass, Sez. I, 10 January 2013, No. 6558, *ibid*, rv 254887-01; Cass, Sez. I, 16 September 2014, No. 41754, *ibid*, rv 260524-01; Cass, Sez. I, 29 March 2018, No. 32279, *ibid*, rv 273714-01; Cass, Sez. I, 23 June 2020, No. 22282, *ibid*, rv 279452-01. See also Scalfati (n 99) 12.

<sup>103</sup> On this topic, see Bortolato, *sub* art. 35-bis o.p. (n 101) 469; R Mastrotaro, *Il 'giusto procedimento' di sorveglianza* (Giappichelli 2022) 81. In case law, see Cass, Sez. V, 5 May 1998, No. 2793, in CED Cass, rv 210936-01; Cass, Sez. I, 27 April 2004, No. 24164, *ibid*, rv 228996-01; Cass, Sez. V, 14 June 2007, No. 34960, *ibid*, rv 237712.

<sup>104</sup> To be identified, as the case may be, in the prison administration, or in the competent local health authority,

---

Moreover, the reference to the provisions on surveillance proceedings implies that the same notice must also be served on the Public Prosecutor and on the prisoner's lawyer.

The described configuration of the hearing of the parties represents the most relevant novelty of the judicial complaint procedure. Indeed, Article 35-bis of the Prison Law does not merely guarantee the presence of the technical parties but ensures that those bound by the underlying substantive relationship are actively involved. In particular, the Administration concerned is guaranteed an advance discovery of the content of the complaint, notified together with the notice of the hearing. Moreover, the Administration may appear at the hearing with its own employee, thus being able to exercise the powers of a party.<sup>105</sup>

As for the complaining prisoner, the reference to the surveillance proceedings allows him to participate personally at the hearing, also by telematic means.

By providing for such participation, the reform made by law-decree 2 October 2018, No. 123 on Article 678, paragraph 3.2, Code of Criminal Procedure has remedied the profound inequality of treatment<sup>106</sup> that existed in the previous discipline, where personal participation in the trial depended on the *locus custodiae*, being limited to prisoners confined in the district of the Magistrate hearing the case.

Since the reform, if the complainant resides in the district of the court that has jurisdiction and expresses the intention to attend the hearing, the Supervisory Penitentiary Magistrate must order that he be brought before the court.

---

when the exercise of the right to health is at stake, or in the school administration, when the prisoner's grievance concerns the right to education. On this topic, see K Natali, 'La fase introduttiva dell'udienza di reclamo giurisdizionale' in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 203 ff.

<sup>105</sup> Bortolato, 'La tutela dei diritti dei detenuti' (n 101) 107. According to the Author, it is precisely the possibility of appearing with one of its own employees that excludes the Administration from necessarily having to be represented by the Avvocatura dello Stato, as is, as a rule, provided for by Art. 1 of the royal decree 30 October 1933, No. 1611. In adhesive sense, see also Natali, 'La fase introduttiva dell'udienza di reclamo giurisdizionale' (n 104) 209. Moreover, the legal representation of the Avvocatura dello Stato has been expressly excluded in case law with reference to the complaint to the Supervisory Penitentiary Tribunal against the order issued by the single judge. See, in particular, Cass, Sez. Un., 21 December 2017 (dep. 2018), No. 3775, in CED Cass, rv 271648-01.

<sup>106</sup> On this topic see, among more authors, G Lozzi, *Lezioni di procedura penale* (Giappichelli 2020) 894 ff; F Caprioli, 'Procedure' in F Caprioli and D Vicoli (eds), *Procedura penale dell'esecuzione* (Giappichelli 2011) 339 ff; Fiorelli (n 3) 145.

However, participation will take place remotely if the prisoner has expressly requested it or if he is detained in an institute outside the jurisdiction of the court hearing the case. It must be said, however, that Article 678, paragraph 3.2, of the Code of Criminal Procedure gives the Supervisory Penitentiary Magistrate the power to order the translation of the person concerned, whenever deemed appropriate.

Anyway, following the amendments introduced by law-decree 10 October 2022 No. 150, the modalities of remote participation<sup>107</sup> will have to comply with the guarantees set out, in general, in the new Article 133-ter of the Code of Criminal Procedure, ie they will have to be implemented ‘in such a way as to safeguard the hearing of the parties and their effective participation’.

Also on the evidence gathering, the reference model is the surveillance procedure, where the judge has broad powers to admit evidence *ex officio*.

Consequently, there is an inversion of the balance that normally governs the distribution of rights to evidence between the parties and the judge:<sup>108</sup> if in the cognitive process, pursuant to Article 190 of the Code of Criminal Procedure, the *ex officio* initiative plays an entirely subsidiary role; in the prison context it is configured as the main instrument for acquiring the cognitive material useful for the decision.

This approach certainly has the merit of rebalancing the asymmetry that pervades the relationship between the prisoner and the Administration, allowing the judge to order the *ex officio* gathering of sources of evidence that are difficult for the prisoner to access.

The means of evidence that can be gathered are mainly documentary evidence, but it is also possible to proceed with the taking of oral evidence, as well as with expert report. On this topic, Article 185 disp. att. of the Code of Criminal Procedure provides that proceedings may be conducted without any particular formalities. The only express limitation is represented by the respect for the hearing of the parties, imposed by Article 666, paragraph 5, of the Code of Criminal Procedure. On this point, it has been observed that the very absence of formalities, while guaranteeing a speedier and more

---

<sup>107</sup> On the topic of remote participation modes see Corte cost, 22 July 1999, No. 342.

<sup>108</sup> See N Rombi, ‘La fase istruttoria nel procedimento per reclamo’ in Fiorentin (ed), *La tutela preventiva e compensativa per i diritti dei detenuti* (n 1) 223 ff.

---

streamlined conduct of the evidence gathering, runs the risk of nullifying the guarantee of hearing of the parties.<sup>109</sup>

Once the evidence gathering phase has been completed, the Supervisory Penitentiary Magistrate makes a ruling, by order, on the merits of the matter complained of and adopts the consequent measures. In particular, on the merits of the complaint, Article 35-bis of the Prison Law requires to ascertain whether the prisoner has actually suffered prejudice to the exercise of his rights and whether it is still current.

Once this has been ascertained, the Supervisory Penitentiary Magistrate orders the Administration to remedy the situation, discretely determining the most effective restorative measure in the specific case,<sup>110</sup> and fixes a time limit for compliance.

The order thus pronounced is, in turn, subject to appeal before the Supervisory Penitentiary Tribunal.<sup>111</sup> In fact, unlike the other remedies operating in the prison environment,<sup>112</sup> the judicial complaint procedure provides for a second level of merit, within the competence of the Supervisory Penitentiary Tribunal, to which a complaint can be lodged within fifteen days from the notification of the filing of the order, issued by the single judge.<sup>113</sup>

On this point, it must be noted that while such a provision is certainly appreciable because it ensures control over issues that are mainly of a practical nature,<sup>114</sup> nevertheless its current configuration has certain aspects that risk undermining the effectiveness of the remedy.

First of all, it is possible that the Supervisory Penitentiary Magistrate, who issued

---

<sup>109</sup> See Caprioli (n 106) 348.

<sup>110</sup> For some critical remarks on this point, see Fiorelli (n 3) 147.

<sup>111</sup> On this topic, see Bortolato, *sub* art. 35-bis o.p. (n 101) 477; Scalfati (n 99) 17.

<sup>112</sup> The only previous case of a double degree of merit is regulated in the Art. 680 of the Code of Criminal Procedure, about security measures and declaration of habituality or professionalism in the offence or of tendency to commit an offence.

<sup>113</sup> On the subject of the relationship between the two levels of the trial of first instance, it is controversial whether the complaint directed to the Supervisory Penitentiary Tribunal can deal with issues that are new in relation to those submitted to the Supervisory Penitentiary Magistrate. In adhesive sense, see Cass, Sez. V, 12 July 2018, No. 42625, in CED Cass, rv 274053-01; *Contra* see Cass, Sez. I, 8 October 2020 (dep. 2021), No. 2303, *ibid*, rv 280229-01.

<sup>114</sup> In this sense, Marafioti, 'Il procedimento per reclamo' (n 7) 429.

the contested order, in the silence of the law, is also part of the collegial court of second instance, compromising its impartiality.<sup>115</sup>

Secondly – as will be seen in more detail below – paragraph 5 of Article 35-bis of the Prison Law allows recourse to a judgement of compliance only if the time limits for appeal have already expired. Therefore, the provision of an intermediate level of appeal, between the first instance and the judgment of legitimacy, results in an inevitable lengthening of the time taken by the proceedings, with the consequent risk that the prejudice, suffered by the prisoner and still ongoing, will end up worsening.<sup>116</sup>

Indeed, it should be recalled that the order issued by the Supervisory Penitentiary Tribunal, as judge of the appeal, may be appealed to the Court of Cassation for violation of the law within fifteen days. Therefore, the guarantee of greater control over the fairness of the decision adopted could, paradoxically, lead to a worsening of the concrete conditions in which the prisoner finds himself.

#### ***4.2. The enforcement of the measure and the judgment of compliance***

Once the appeal stages have been completed, the instruments to protect prisoners' rights are not yet finished.

In fact, it is possible to bring a special judgement of compliance aimed at challenging the Administration's persistent failure to fulfil its obligations, in order to prevent the recognition of prejudice to the exercise of a right from remaining a mere statement of principle.<sup>117</sup>

In particular, Article 35-bis, paragraph 5, of the Prison Law allows the prisoner or his lawyer, with a special power of attorney, to request compliance from the same Supervisory Penitentiary Magistrate who upheld the complaint.<sup>118</sup> For this to be the

---

<sup>115</sup> Della Bella, *Emergenza carceri e sistema penale* (n 2) 141, considers that the question can be resolved by way of interpretation through the analogical extension of the cases in which such an exclusion is provided for (reference is made, in particular, to Art. 30-bis and 53-bis of the Prison Law). On the subject of the judge's impartiality in surveillance proceedings, see Scalfati (n 99) 9 ff.

<sup>116</sup> In this sense, Della Bella, *Emergenza carceri e sistema penale* (n 2) 141.

<sup>117</sup> On this topic, see F Fiorentin, 'Lesioni dei diritti dei detenuti conseguenti ad atti e provvedimenti dell'amministrazione penitenziaria' [2010] *Giur merito* 2834.

<sup>118</sup> For the orientation that extends jurisdiction also to the Supervisory Penitentiary Tribunal see Cass, Sez. I, 30

---



case, it is necessary that, at the expiry of the time limit set for compliance, the Administration has not implemented<sup>119</sup> the order upholding the complaint and that the latter is no longer subject to appeal.

Once the application has been submitted, proceedings begin, conducted in accordance with the forms set out in Articles 666 and 678 of the Code of Criminal Procedure, and, when they are over, the Supervisory Penitentiary Magistrate may order compliance, specifying the manner and timing of compliance. But if, in the meantime, the Administration has adopted acts in breach or circumvention of the order that have remained unfulfilled, the Supervisory Penitentiary Magistrate has the power to declare those administrative acts null and void. Finally, where necessary, a commissioner *ad acta* may be appointed.

Before the introduction of these rules, the prisoner was, *de facto*, powerless against the Administration's inaction, although the binding effect of the decisions adopted by the Supervisory Penitentiary Magistrates was already generally recognised.<sup>120</sup>

In order to deal with this situation, the doctrine<sup>121</sup> had proposed to apply, even in the prison environment, the judgement of compliance, ie the instrument used in the administrative sphere to make the orders given by the judicial authority to the public Administration<sup>122</sup> enforceable.

---

May 2019, No. 30382, in CED Cass, rv 276406-01; Cass, Sez. I, 8 June 2020, No. 21940, *ibid*, rv 279334-01. Still on the subject of jurisdiction to decide on the request for compliance see Cass, Sez. I, 13 January 2022, No. 17167, in CED Cass, rv 282953-01.

<sup>119</sup> About the problem of inaccurate fulfilment, see A Luzio, 'Tutela dei diritti dei detenuti ed ottemperanza' in Del Coco, Marafioti and Pisani (n 2) 167; Marafioti, 'Il procedimento per reclamo' (n 7) 430; Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 277; Valentini (n 47) 249.

<sup>120</sup> In particular, for the thesis based on Art. 69, paragraph 5, of the Prison Law, see Corte cost, 23 October 2009, No. 266, [2009] Giur cost 3766, with comment by C Renoldi, 'Una nuova tappa nella "lunga marcia" verso una tutela effettiva dei diritti dei detenuti'; Corte cost, 7 June 2013, No. 135. On this topic, see also A Gargani, 'Sovraffollamento carcerario e violazione dei diritti umani: un circolo virtuoso per la legalità dell'esecuzione penale' in D Brunelli, S Canestrari and F Basile (eds), *Studi in onore di Franco Coppi* (Giappichelli 2012) 1037 ff.

<sup>121</sup> M Ruotolo, 'Sul problema dell'effettività della tutela giurisdizionale dei diritti dei detenuti' [2012] Giur cost 690. *Contra* F Falzone, 'La sentenza n. 266/2009 della Corte costituzionale: è innovativa dell'attuale sistema dei diritti dei detenuti?' [2010] (3) Rass penit crimin 120.

<sup>122</sup> On the subject of the judgment of compliance in administrative proceedings see, among more authors, G Mari, 'Il giudizio di ottemperanza' in MA Sandulli (ed), *Il nuovo processo amministrativo* (Giuffrè 2013) 457 ff; Lopilato

Despite its formal qualification, the remedy introduced in the penitentiary context turns out to be only partially superimposable on the reference model. Consider, first of all, the fact that the jurisdiction is conferred on the Supervisory Penitentiary Magistrates, instead of the administrative judge, who ordinarily has jurisdiction over actions for compliance brought not only against the administrative judge's decisions, but also against final decisions of the ordinary judge.

Even more relevant appears the difference that limits compliance in the prison context to orders that can no longer be appealed, as opposed to a general model that can be activated against executive orders, even if not final. Consequently, although the order of the Supervisory Penitentiary Magistrate is already enforceable, pursuant to Article 666, paragraph 7, of the Code of Criminal Procedure, the prisoner is, *de facto*, forced to wait for the definition of all levels of appeal, before being able to resort to executive protection.<sup>123</sup>

The repercussions in terms of the right to appeal are obvious, since the decision to request a review of the decision at first instance would delay the possibility of enforceable protection, with the consequent risk that the prejudice to the exercise of rights, still in progress, would end up being aggravated. It has, therefore, been proposed on several occasions<sup>124</sup> to expunge from the text of Article 35-bis, paragraph 5, of the Prison Law the reference to the measure 'no longer subject to appeal', admitting recourse to the enforcement of the order even before the time for appeal has expired. Although this is a fundamental profile for the overall effectiveness of the remedies system, the legislator has not yet intervened to change it.

---

(n 49) 2031 ff; A Travi, *Lezioni di giustizia amministrativa* (Giappichelli 2023) 395 ff.

<sup>123</sup> More generally, on the relationship between irrevocability and enforceability, see Gaito and Ranaldi (n 98) 38 ff; Caprioli, 'Irrevocabilità, esecutività, giudicato' in Caprioli and Vicoli (n 106) 64 ff; R Fonti, 'Il giudicato penale' in M Ceresa Gastaldo (ed), *Procedura penale esecutiva* (Giappichelli 2020) 40. With specific reference to the stability of the order concluding the surveillance procedure, see Scalfati (n 99) 18; Mastrotaro (n 103) 288 ff.

<sup>124</sup> See the *Relazione* accompanying the articulation proposed by the *Commissione per la riforma dell'ordinamento penitenziario nel suo complesso*, established by ministerial decree 19 July 2017 and chaired by Professor Glauco Giostra, 120, as well as the *Relazione finale* issued on 17 December 2021 by the *Commissione per l'innovazione del sistema penitenziario*, established by ministerial decree 13 September 2021 and chaired by Professor Ruotolo, 166 ff. Both reports are available at <[www.giustizia.it](http://www.giustizia.it)> accessed 24 July 2023.

---

The prison judgement of compliance<sup>125</sup> deviates further from the reference model because it does not allow the Supervisory Penitentiary Magistrate to order the Administration, at the request of a party, to pay a sum for each subsequent breach or non-compliance, or for each day of delay in execution. It is worth noting that, originally, law-decree 23 December 2013, No. 146<sup>126</sup> had contemplated this possibility, limiting the amount of the daily penalty to a maximum of one hundred euros and pointing out that the Supervisory Penitentiary Magistrate's ruling would constitute an enforceable title for the collection of the overall sum owed by the Administration.

However, when the decree was converted, this provision was unreasonably removed from the text of Article 35-bis of the Prison Law, with detrimental effects on the effectiveness of the protection.<sup>127</sup> Therefore, even recently, its reintroduction has been called for.<sup>128</sup>

#### ***4.3. The ineffectiveness of compensatory remedies under Article 35-ter of the Prison Law***

Even with regard to the remedies of a restorative nature, regulated by Article 35-ter of the Prison Law, doubts have been expressed as to their effectiveness.

In particular, this provision allows those who have suffered a detention contrary to humanity, for a period of not less than fifteen days, to apply to the Supervisory Penitentiary Magistrate in order to obtain a reduction of the prison sentence still to be served, equal to one day for every ten days served in conditions detrimental to human rights. If, on the other hand, the violation has lasted less than fifteen days or if the residual period of imprisonment precludes the application of the specific form of protection, the Supervisory Penitentiary Magistrate may award compensation in the form of a pecuniary payment, amounting to EUR 8 for each day of detention contrary to humanity.

Finally, if the execution of the custodial sentence has already ended or the injury

---

<sup>125</sup> An expression used by Natali, *Il reclamo giurisdizionale al magistrato di sorveglianza* (n 46) 273.

<sup>126</sup> See Art. 3, law-decree 23 December 2013, No. 146 in Gazz. Uff., Serie Generale n. 300 of 23 December 2013.

<sup>127</sup> See Luzio (n 119) 291.

<sup>128</sup> See *Relazione finale*, 17 December 2021, by *Commissione per l'innovazione del sistema penitenziario* (n 125) 168.

---

was suffered during the pre-trial detention in prison, the relevant action must be brought before the civil court and only pecuniary compensation is allowed.

A first profile, which may prejudice the effectiveness of the remedies under Article 35-ter of the Prison Law, concerns the need to ascertain that the prejudice complained of by the prisoner is current. According to one interpretation,<sup>129</sup> in fact, by virtue of the reference to Article 69, paragraph 6, letter b) of the Prison Law, contained in the above-mentioned provision, even this form of complaint was to be considered subordinate to the actuality of the injury complained of, and the latter had to be ascertained both at the time the application was submitted and – according to the most extreme view – at the time of the decision. This had led to the pronouncement of a significant number of decrees of inadmissibility, especially in the period immediately following the entry into force of Article 35-ter of the Prison Law.

The hermeneutical option now prevailing,<sup>130</sup> however, considers that the reference to Article 69, paragraph 6, letter b) of the Penitentiary Act is limited to listing the relevant injuries under Article 35-ter of the Prison Law within the genus ‘prejudice to the exercise of rights’, without incorporating the relevant requirements. It was therefore opted for the solution that would ensure the widest possible application of the compensatory remedies under Article 35-ter of the Prison Law.

A further factor of ineffectiveness coincides with the ‘mobile reference’ to the case law of the Strasbourg Court, expressly provided for in the text of Article 35-ter of

---

<sup>129</sup> We refer to what F Fiorentin, “Rimedi compensativi” per l’inumana detenzione: l’attualità del pregiudizio non è (probabilmente) rilevante per il risarcimento’ [2016] Cass pen 692, calls the ‘actualist’ thesis, supported, in particular, by Mag sorv Alessandria, 31 October 2014 in [2015] Cass pen 2018, with comment by A Penoncini, ‘Il “rimedio risarcitorio” da detenzione inumana tra aspettative costituzionali e svilimenti ermeneutici’, and by Mag sorv Vercelli, 24 September 2014, available at <[www.personaedanno.it](http://www.personaedanno.it)> accessed 24 July 2023. The CSM had also expressed a favourable opinion on the subject. See, in particular, technical opinion adopted by resolution of 30 July 2014, No. 92, para 6, <[www.csm.it](http://www.csm.it)> accessed 24 July 2023.

<sup>130</sup> In the doctrine, see E Santoro, ‘Contra CSM: parlare a nuora perché suocera intenda. Pedanti osservazioni sulla competenza dei magistrati di sorveglianza a riconoscere l’indennizzo ex art. 35-ter per la detenzione inumana e degradante’ (2015) *Dir pen cont* <[www.archiviodpc.dirittopenaleuomo.org](http://www.archiviodpc.dirittopenaleuomo.org)> accessed 24 July 2023; Penoncini (n 129) 697 ff; G Giostra, ‘Un pregiudizio “grave e attuale”? A proposito delle prime applicazioni del nuovo art. 35-ter ord. penit.’ (2015) *Dir pen cont*, para 5 <[www.penalecontemporaneo.it](http://www.penalecontemporaneo.it)> accessed 24 July 2023. In the jurisprudence of legitimacy, see Corte cass, Sez. I, 16 July 2015 (dep. 2016), No. 876, in CED Cass, rv 265856-01, Corte cass, Sez. I, 16 July 2015, No. 46966, *ibid*, rv 265973-01; and lastly, Corte cass, Sez. I, sent. 29 March 2017, No. 19674, *ibid*, rv 269894-01; Corte cass, Sez. I, sent. 2 October 2020, No. 31042, *ibid*, rv 279798-01.

---

the Prison Law.

As is well known, indeed, the aforementioned remedies operate when the injury referred to in Article 69, paragraph 6, letter b) of the Prison Law<sup>131</sup> has integrated detention conditions such as to violate Article 3 ECHR, 'as interpreted by the European Court of Human Rights'.

Due to the legal provision of a reference to the case law of the Strasbourg Court, which is by nature characterised by a casuistic approach,<sup>132</sup> considerable uncertainties in concrete application have occurred.

In fact, on the basis of this referral, the complaint can only be upheld if the Supervisory Penitentiary Magistrate considers that the existence of detention conditions which, according to the case law of the Court, constitute a violation of Article 3 ECHR has been adequately proven. This makes the burden of proof on the person concerned particularly difficult, since the case-law of the European Court appears to lack unequivocal criteria for assessing when the treatment suffered can be considered inhuman and degrading. In order to compensate for these evidentiary difficulties, a number of pre-filled forms, accompanied by a *vademecum*, have been prepared as a matter of practice<sup>133</sup> to assist the prisoner in preparing a complaint.

Moreover, according to jurisprudence of legitimacy,<sup>134</sup> there would be a relative presumption of truthfulness with regard to the elements put forward by the

---

<sup>131</sup> For the application of the guarantees typical of surveillance proceedings in Articles 666 and 678 of the Code of Criminal Procedure, with the peculiarities provided for the judicial complaint *ex* Art. 35-bis of the Prison Law, see Corte cass, Sez. I, sent. 16 July 2015 (dep. 2016), No. 876, in CED Cass, rv 265855-01, as well as Corte cass, Sez. I, sent. 16 July 2015, No. 46966, *ibid*, rv 265973-01. In the doctrine, see A Della Bella, 'Il risarcimento per i detenuti vittime di sovraffollamento: prima lettura del nuovo rimedio introdotto dal d.l. 92/2014' (2014) *Dir pen cont*, 7 <[www.archiviodpc.dirittopenaleuomo.org](http://www.archiviodpc.dirittopenaleuomo.org)> accessed 24 July 2023, as well as Marafioti, 'Il procedimento per reclamo' (n 7) 432. *Contra* see M Deganello, 'I rimedi risarcitori' in Caprioli and Scomparin (n 2) 277.

<sup>132</sup> See A Laurito, 'Reclamo giurisdizionale e rimedi compensativi a tutela degli internati: gli esclusi "eccellenti" della riforma' [2016] (7-8) *Giur pen web* 10; S Romice, 'Brevi note a margine dell'introduzione dei rimedi risarcitori in favore dei detenuti e degli internati' (2014) *Federalismi, Focus Human Rights*, 6 <[www.federalismi.it](http://www.federalismi.it)> accessed 24 July 2023.

<sup>133</sup> See eg S Filippi, 'Nota esplicativa e modelli di reclamo per denunciare le condizioni di detenzione ex artt. 35-bis, 35-ter e 69 L. 354/1975' (*Osservatorio Antigone*) <[www.osservatorioantigone.it](http://www.osservatorioantigone.it)> accessed 24 July 2023.

<sup>134</sup> See Cass, Sez. I civ., sent. 11 May 2018, No. 23362, in CED Cass, rv 273144-01, as well as Cass, Sez. IV civ., sent. 8 June 2020, No. 18328, *ibid*, rv 279208-01.

---

complainant, whenever the request appears to be sufficiently determined and has been verified by the defendant Administration as to the existence of detention and the relevant period. It is therefore the prison Administration that must present contrary evidence to refute the complainant's allegations.

The reference to the Strasbourg case-law also affects the criteria that should guide the national Supervisory Penitentiary Magistrates during the decision. Indeed, the court hearing the compensatory complaint must assess the detention conditions, complained of by the applicant, in the light of the interpretation provided by the ECHR on inhuman and degrading treatment. Consequently, the judge is obliged to keep himself constantly informed of the hermeneutical developments outlined in the European Court. With the aim of lightening the burden of updating, imposed on the judge, the doctrine<sup>135</sup> has proposed to use the rulings of the European Court of Human Rights, on the subject of detention conditions, as a minimum standard of protection, from which the national judge, while never being able to depart *in pejus*, could adopt a divergent interpretation, aimed at increasing the level of protection guaranteed to the person concerned. However, the Court of Cassation took the opposite view on this point, and, in its most authoritative opinion,<sup>136</sup> held that the mobile reference makes European case-law a normative parameter, which integrates the preceptive content of Article 35-ter of the Prison Law and is therefore binding *erga omnes*. It follows, therefore, that it is impossible for the national court to depart, even if *in melius*, from the indications provided at supranational level, as long as they are the expression of a right consolidated in the ECHR case-law.

It seems, therefore, that if the national interpreter doubts the compatibility with the Constitution of Article 35-ter of the Prison Law, thus supplemented, the only possible course of action is to request the intervention of the Constitutional Court.

---

<sup>135</sup> In this sense, F Fiorentin, 'Rimedi risarcitori per l'inumana detenzione: il giudice ordinario come l'asino di Buridano' [2017] Cass pen 1194.

<sup>136</sup> See Cass, Sez. Un., 24 September 2020 (dep. 2021), No. 6551 in CED Cass, rv 280433.

---

## 5. *Prisoners' right and their discontinuous effectiveness*

The correctional idea is at the heart of the Italian prison model. This entails awards and penalties as a governing principle of prison life. The model has managed for the last fifty years to manage penitentiary institutions. The possibility of early release, subject to good conduct and cooperation with treatment programmes, has structured the system in terms of stability and manageability. In the process, prison treatment, including social, occupational and recreational opportunities, has become increasingly dull and bureaucratised. This custodial model tends to restrain and 'entertain' people, rather than plan for their social and occupational integration. In general, Italian penal institutions, with some notable exceptions, are places where life is spent in idleness, in a cell for too many hours a day. Every minor thing is regulated by 'application', which grants permission by the authority in charge to do whatever prisoners think appropriate for their rehabilitation. These applications are swamped in a slow bureaucratic process where approval is discretionary if not arbitrary. In this paternalistic model, prisoners' rights are downgraded to concessions, to gifts from the authorities.

Prison life often flows without clarity around the rules to be followed and the rights that can be demanded. It is unusual that written rules relating to the prison regime itself, in the respective languages of the inmates, are distributed. Prisoners are too often infantilised and any form of responsibility is taken away from them. Rehabilitation activities are almost entirely left to local authorities, cooperatives and voluntary associations. Few prisoners (less than one thousand) enjoy open regimes of incarceration. Around 10,000 are detained in high surveillance units, where rehabilitative treatment is drastically reduced, and more than 700 are kept in special security prisons (41-bis sections), mainly members of criminal organisations who are deprived of any external contact. The remaining prisoners are kept under a medium security regime.

In this prison model we can observe a deep gap between the rights officially granted to prisoners by rules and regulations and the rights actually enjoyed by them. What is practically lacking is a 'meta right', namely the right to claim one's rights. Changes are always very slow in the prison system. Since 2013 – after *Torreggiani's* pilot judgment – prisoners have the opportunity to initiate legal procedures when their rights are violated. Written complaints are sent to magistrates in charge of supervising the

---

running of institutions. Moreover, in Italy a national independent organism entrusted with the monitoring of the places and conditions of detention has been set up in 2014. Despite these relevant legal changes, the problem of the effectiveness of rights still remains in the hands of the prison administration. There are too many differences from prison to prison. It is not easy to claim prisoners' rights in the condition of restricted liberty. For this to happen, a cultural revolution is needed to transform every prison officer into the first guarantor of prisoners' rights.

One example is paradigmatic. The most important issue in custodial institutions remains the psycho-physical conditions of the inmates. This was part of the remit of the Ministry of Justice. But since 2006, in the name of equity in the provision of health services, prisoners have access to the same health system, which is decentralised at the regional level, as ordinary citizens. However, the provision is insufficient, also because the health system is more oriented towards therapy rather than prevention. The sanitary and hygienic conditions in prison, particularly in large cities, would require regular monitoring and control, which do not often take place.

Changing the subject, according to the official regulations governing prisons, work is a right for all inmates who have been sentenced. But just one out of three inmates works. Prisoners should earn two thirds of the salary earned by workers in liberty for the same job, but this does not happen. Around 85% of those who do work are employed by the prison administration itself, which does not provide the 'fortunate' workers with an attractive occupational record. Who would mention in their CV that they have been cooks, dish washers or cleaners in a prison institution?

Also, the right to education is hardly promoted and left to the discretion of governors. There is a lack of national strategy in this area, as there is a lack of understanding how education would impact on recidivism.

It is not easy to guarantee human rights in prison even when these are expressly provided for in the laws. For this reason, it is important, probably decisive, for external and independent eyes (like the academic ones) to look at what happens inside prisons and push institutions to reduce the gap between punishment provided for in the laws and punishment actually imposed.